United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

74-1653 & 1871

To be argued by
RICHARD BROOK

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

ORIGINAL
WITH PROOF
OF SERVICE

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Petitioner,

-against-

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review and Set Aside an Order of the National Labor Relations Board and on Cross-Application for Enforcement

BRIEF FOR PETITIONER

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

C.A. Docket Nos. 74-1653
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ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

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BRIEF FOR PETITIONER

STATEMENT OF THE ISSUE PRESENTED

Whether this Court should refuse to enforce the NLRB's order dated April 8, 1974 as written and require the NLRB to delete all reference to the phrase "any other employer or person" and words to the same effect so that the order is limited to the employer parties involved in this case.

STATEMENT OF THE CASE

There is only one limited issue before this Court -- the propriety of the scope of the National Labor Relations Board's order. No appeal has been taken by the Union from the NLRB's decision and the only question before the Court is whether the Record supports an order which is not limited to the parties involved but is so broad as to include "any other employer or person".

The petitioner in this case seeks only that the order be modified to delete the underscored language:

> "(a) Engaging in, or inducing or encouraging employees of Mandell & Corsini, Inc., or any other employer or person engaged in commerce or in an industry affecting commerce, to engage in, a strike or other refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services; or (b) threatening coercing, or restraining Mandell & Corsini, Inc., or any other person engaged in commerce or in an industry affecting commerce; where in either case an object thereof is to force or require Mandell & Corsini, Inc., or any other employer or person to cease using, selling, handling, transporting, or otherwise dealing in the products of the Trane Company, or any other employer or person, or to cease doing business with the Trane Company, or any other employer or person." (emphasis added) (A19-20).*

The Union filed a petition to modify and set aside that part of the National Labor Relations Board's order of

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* Citations to the Appendix are designated as "A _____".

April 8, 1974 (A4, 19-20) which prohibits the Union from engaging in so-called secondary boycott activities,* not only as to Mandell & Corsini Inc. (the charging party in this case) and Trane Company, but in addition, as to "any other employer or persons engaged in commerce". The National Labor Relations Board (hereinafter referred to as the "NLRB" or "the Board") cross petitioned for enforcement of its order in toto.

The NLRB order is open ended at both ends; it prohibits broad categories of Union activities as to Mandell & Corsini and "any other employer" in relation to "any other employer" similarly situated to Trane Company.

There is nothing in the Record before this Court and there was nothing in the record before the NLRB or before its Administrative Law Judge to justify a remedial order which, in sweeping terms, goes beyond the dispute in question.

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* National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(4)(i)(ii)(B).

FACTS

As can readily be seen from the caption of this case, the Union has work jurisdiction over steamfitting and pipefitting construction work in the greater New York area, namely, New York City, Nassau and Suffolk Counties, New York. This Court may take judicial notice of the fact that this seven county area is the most populous metropolitan area in the nation, an area in which a tremendous amount of construction work has taken place since the enactment of the Taft-Hartley Act of 1947.

This Union has conducted itself in an admirable and lawful fashion in complying with the secondary boycott provisions of the Taft-Hartley Act.

The factual situation out of which the instant NLRB order resulted, boils down to nothing more than two alleged statements, namely, that Business Agent John Donnelly asked the foreman and job steward to let him know when the units in question (vertical fan coil units) were delivered to North Shore Towers so that he could ascertain whether those units complied with the terms of the collective

bargaining agreement between Mandell & Corsini and the Union (the alleged inducement of a strike within the meaning of Section 8(b)(4)(i)(B)) (A 113-114) and an alleged statement by Mr. Donnelly to Mr. Corsini, of Mandell & Corsini, that the units would not be installed because they were violative of the labor agreement (the alleged "threat" within the meaning of 8(b)(4)(ii)(B)) (A 60, 65; cf. 148).

It is important to note that no action or conduct occurred; the units in question were in fact installed and are being installed. There was no picketing, no work stoppage, and no violence involved in this matter.

ARGUMENT

THE NLRB'S ORDER, BROAD AT BOTH ENDS, IS NOT ENTITLED TO ENFORCEMENT SINCE THE SCOPE OF THE ORDER IS NOT WARRANTED BY THE RECORD IN THIS CASE.

The Record in this case reveals that not one iota of evidence exists upon which a broad order can be justified.

The NLRB's complaint (A 22) makes no reference to any broad pattern of unlawful secondary boycott activity by this Union. Nor was any testimony taken regarding any wide-ranging scheme or pattern or history of secondary boycott activity.

The NLRB, through counsel, was advised that the Union would consent to a narrow order, during the conference before this Court's Staff Counsel. This litigation is thus a misuse of this Court's time and unduly burdensome on the Union.

This Court has only recently held that broad orders such as the one entered by the NLRB in this case will not be enforced where the Record does not support such drastic relief. National Labor Relations Board v. Local Union No. 25, International Brotherhood of Electrical Workers, AFL-CIO, 491 F.2d 838 (1974). In that case this Court held as follows concerning the scope of the NLRB's order:

> "There remains for consideration the argument of Local 25 that the Board's order is too broad. We find no evidence on the instant record that Local 25 had engaged in a violation against the employees of any employer other than Comtech.
>
> "In a dissimilar situation to be sure but in stating a principle here applicable in light of the facts of record, the Supreme Court said:
>
> > '. . . [W]e find neither justification nor necessity for extending the coverage of the order generally by the inclusion therein of the phrase "any other employer."
>
> "The Court continued:

'It would seem . . . clear that the authority conferred on the Board to restrain the practice which it has found . . . to have [been] committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct (citations omitted).

"The Board may submit an appropriate order which will take account of our observations. The order heretofore entered by the Board will be modified by deleting 'any other person', 'such other person', and 'with any other person'. As and when so modified, the Board's order will be enforced." 491 F.2d at 841. (Footnotes omitted).

Previously, this Circuit also ruled that the drastic imposition of a broad order will be tolerated only upon a sufficiently strong showing of a chronic and incorrigible pattern of violations so severe so as to amount to a proclivity to violate the particular section of the labor law complained of.

Thus, as early as 1960, this Court held, in a case involving this Local Union that:

"The Board's order is, however, too broadly drawn, since it orders the respondents to cease and desist from inducing the employees of Courter or of any other employer to engage in a concerted refusal to handle goods, where an object thereof is: (1) to force or require Edison to cease dealing in the products of Midwest or of anyone else who does not fabricate

> its products at Edison's job sites; (2) to force or require Edison to cease doing business with Midwest or anyone else who does not fabricate its products at Edison's job sites; or (3) to force or require Courter, Midwest, or anyone else to cease doing business with Edison. The Board's power to issue cease-and-desist orders extends only to acts found to be unfair labor practices, 29 U.S.C.A. § 160(c) ('an order requiring such person to cease and desist from such unfair labor practice'). There was no evidence in the record that the respondents attempted to influence anyone else's employees than Courter's, or that the respondents sought to compel Courter or anyone other than Midwest to cease doing business with Edison. Therefore, the order should be narrowed by deleting the portions of the order which we have italicized. An administrative agency, like a court, should decide only that which is brought before it. See N.L.R.B. v. Express Pub. Co., 312 U.S. 426, 433, 61 S. Ct. 693, 85 L. Ed. 930; Local 636, supra, 278 F.2d at page 865. And the notice required by clause 2, of course, should be altered to conform with the change in the order.
>
> "Order modified and enforcement granted." N.L.R.B. v. Enterprise Association, etc. Local 638, 285 F.2d 642, 646. (Emphasis supplied).*

The approach taken by this Court has been repeatedly approved by the United States Supreme Court. In a different context the Supreme Court found a broad order unjustified for the following reasons:

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* On rehearing, this Court found that it was without power to so modify the Board's order in light of the fact that no exceptions from the Trial Examiner's recommended order had been taken to the National Labor Relations Board in that case.

"Petitioners were not found to have engaged in violations against the employees of any employer other than Ohio Consolidated and we find neither justification nor necessity for extending the coverage of the order generally by the inclusion therein of the phrase 'any other employer.' 'It would seem * * * clear that the authority conferred on the Board to restrain the practice which it has found * * * to have [been] committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct'. National Labor Relations Board v. Express Pub. Co., 1941, 312 U.S. 426, 433, 61 S. Ct. 693, 698, 85 L. Ed. 930. See also May Dept. Stores Co. v. National Labor Relations Board, 1945, 326 U.S. 376, 66 S. Ct. 203, 90 L. Ed. 145." Communications Workers of America v. NLRB, 362 U.S. 479, 480-481 (1960).

The Supreme Court also held, in N.L.R.B. v. Express Publishing Co., 312 U.S. 426, 433 (1941) as follows:

"But we think it does not follow that, because the acts of respondent which the Board has found to be unfair labor practice defined by § 8(5) are also a technical violation of § 8(1), the Board, in the circumstances of this case, is justified in making a blanket order restraining the employer from committing any act in violation of the statute, however unrelated it may be to those charged and found, or that courts are required for the indefinite future to give effect in contempt proceedings to an order of such breadth."

Other Courts of Appeals are in agreement. See, e.g., United Brotherhood of Carpenters v. N.L.R.B., 286

F.2d 533, 539 (D.C. Cir. 1960); N.L.R.B. v. Carpenters, 276 F.2d 694 (7th Cir. 1960).

Only recently, the District of Columbia Circuit in San Francisco Local Joint Executive Board of Culinary Workers v. N.L.R.B., 86 L.R.R.M. 2828 (1974), refused to enforce a broad order, even when addressed to numerous violations of 8(b)7(C). That Court explained its actions as follows:

> "Though the Board is not limited under Section 10(c) of the Act, 29 U.S.C. § 160(c), to a 'rigid scheme of remedies' for unfair labor practices, Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194, 8 LRRM 439 (1941), the authority conferred on the Board by Section 10(c) 'is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct,' NLRB v. Express Publishing Co., 312 U.S. 426, 433, 8 LRRM 415 (1941). See also May Department Stores Co. v. NLRB, 326 U.S. 376, 392-393, 17 LRRM 643 (1945). The Supreme Court has thus held that broad Board orders against a union protecting 'any other employer' are only justified where there is evidence that the unlawful activity was part of a 'generalized scheme' to violate the Act against all employers. Communication Workers v. NLRB, 362 U.S. 479, 480-481, 46 LRRM 2033 (1960). This court has followed the Supreme Court in disfavoring broad remedial orders such as those entered by the Board in the instant cases. Local U. No. 519, United Assn of Journeymen etc. of Plumbing etc. Industry v. NLRB, 135 U.S. App. D.C. 105, 111, 416 F.2d 1120, 1126, 70 LRRM 3300 (1969); Local No. 636, United Assn of Journeymen etc. of Plumbing etc. Industry v. NLRB, 108 U.S.

App. D.C. 24, 31, 278 F.2d 858, 865, 45 LRRM 3023 (1960); Int. Brhd of Teamsters etc. v. NLRB, 104 U.S. App. D.C. 359, 365, 262 F.2d 456, 461, 43 LRRM 2197 (1958).

"In the absence of substantial evidence on the record in any of these cases that the proven unfair labor practices were part of a generalized scheme to violate the Act, we continue to disfavor these broad orders . . . .

". . . . We do not believe that two previous Board unfair labor practice findings against a union without more prove that it is engaged in a generalized scheme to violate the Act. The union here is a sizable labor organization in a major metropolitan area; when placed in the context of all its activities, these two violations, even when augmented by the violations found in Nos. 73-1579 and 73-1605, take on the coloration of isolated incidents in which the union, perhaps innocently misconstruing the Board's jurisdictional limitation principles, was somewhat overzealous in pursuing its legitimate organizational goals." 86 LRRM at 2834. (Footnotes omitted).

Broad orders have been enforced only in those rare instances in which a repeated pattern of violations has clearly been shown and even then there is an additional factor, e.g., when the repeated pattern is shown to be aimed at a particular employer target. See, e.g., NLRB v. Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, 477 F.2d 260 (2d Cir. 1973) [violations against the same employer in 1963, 1964, 1972 and 1973, plus contempt of District Court's injunction].

Even that order is broad at only one end, whereas, the instant order is broad at both ends.

The above cases indicate that before a broad order is properly enforced, the following factors must be shown:

1. The Record must contain evidence showing a "proclivity" to violate the secondary boycott provisions as evidenced by frequent, repeated violations. NLRB v. Express Publishing Co., supra. No evidence exists at all on this Record concerning this question. The prior cases involving Local 638 are insufficient in light of the absence of argument and testimony on this issue, to establish a "proclivity".

2. Prior violations must be reviewed in the context of the size of the union and the geographic area which it encompasses. San Francisco Local Joint Executive Board of Culinary Workers v. N.L.R.B., supra. Here, the Union has thousands of members, working for hundreds of employers, in the most populated and building prone area of the country.

3. The number of violations must also be viewed with regard to the time intervals between them. Local 25, IBEW v. NLRB, supra; Compare Local 282, Teamsters (United States Trucking Corporation), 146 NLRB 956, 963-964, (1964) [3 violations within a period of four months] with Local 25, International Brotherhood of Electrical Workers, AFL-CIO (Eugene Iovine, Inc.), - Administrative Law Judge Decision JD-611-72 pp. 13-15 (complaint dismissed, 201 NLRB No. 80), and cases cited therein [3 violations of Section 8(b)(4)(B) did not warrant broad order in light of

number of years intervening between violations.] Here, three of the five violations are more than a decade old and of the remaining two, one is currently on appeal.

4. The singling out of a particular employer target is relevant. Local 3, IBEW v NLRB, supra. Here no vendetta or scheme to injure an employer is even alleged.

5. Whether the violations found were close questions as a matter of law. San Francisco Local Joint Executive Board v. N.L.R.B., supra. Here, the Austin case pending before the District of Columbia Circuit may well vindicate the Union's conduct in that case.

In light of the above criteria for whether broad orders are warranted in a particular case, it is clear that the five cases referred to in footnote 23 of the Administrative Law Judge's Decision are wholly inadequate to support such a broad order. There is no NLRB explanation as to how the five cases cited in any way show a proclivity to violate the Act so as to warrant a broad order.

Of the five cases cited by the Administrative Law Judge, three involved what can only be described in labor relations terms as "ancient history". The Consolidated Edison case, 124 NLRB 521 was decided by the NLRB in 1959 and concerned conduct in 1958.

Two other cases are also rather ancient matters. Thus, the Allen-Stevens Corporation, 129 NLRB 555 was

decided in 1960 concerning conduct which took in the early part of that year and the All-Boro Air Conditioning Corp. 136 NLRB 1631, was decided in 1962 regarding conduct which occurred in 1961. Not only has more than a decade past since The Allen-Stevens Corporation and the All-Boro Air Conditioning Corp. cases were decided, but the conduct described therein is of a most de minimus nature as was the conduct which allegedly occurred in 1972 in Enterprise Fire Sprinkler Corp., J.D.-198-73. The Austin case decided in 1973 concerning conduct in 1972 involves the important right of control issue and is now on appeal before the United States Court of Appeals for the District of Columbia Circuit, Docket No. 73-1764 Enterprise Association, etc. v. NLRB. That case has been argued and a decision is pending. It is not at all clear that the en banc judgment by that Court will not vindicate the Union's actions in that proceeding. Thus, that "violation" should not be given any weight whatsoever by this Court in assessing the propriety of the broad order herein.

Finally, nothing in the decision of the NLRB and its Administrative Law Judge gives any inkling of proclivity by the Union to violate the secondary boycott provisions of the Act.

CONCLUSION

Other than the two alleged "conversations" relied upon by the Board by Business Agent Donnelly, there is no evidence at all of a violation in this instance. There is no warrant at all in the Board's decision to support a broad order, especially one which is open ended at both ends (i.e. as to employer A or any other employer vis a vis employer B or any other employer).

There is nothing before this Court to show a proclivity by this Union to violate the secondary boycott laws. The Union's record, considering its size and its geographic jurisdiction is one of restraint and compliance with the law.

To enforce a double-ended broad order against this Union, on this Record, would be a grave misjustice in depriving the Union of its rights without threat of contempt to enforce its contractual rights by engaging in peaceful-free speech and actions to determine whether such contractual rights have been violated. The right to cease work is unlawful only to the extent that it is specifically prohibited by statute.

For the above reasons, the order of the NLRB should be modified by deleting therefrom any reference to "any other employer or person". Local 25, IBEW v. NLRB, supra.

Respectfully submitted,

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Of Counsel:

Richard Brook

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Preston Anderson, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 980 Simpson St Bronx NY.

That on the 25 day of Sept, 1974, deponent personally served the within Brief for Petitioner upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

Elliot Moore
Deputy Associate General Counsel
National Labor Relation Board
1717 Pennsylvania Ave N.W.
Washington D.C. 20570

Preston Anderson

Sworn to before me this
25 day of Sept, 1974

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1975